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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 281

LOCAL 776, IATSE (FILM EDITORS),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ROBERT W. GILBERT,
LOUIS A. NISSEN,
WILLIAM B. IRVIN,
Suite 201,
8907 Wilshire Boulevard,
Beverly Hills, California,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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LOCAL 776, IATSE (FILM EDITORS),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Motion Picture Film Editors, Local 776 of the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 10, 1962, granting enforcement, as modified and interpreted by said Court's opinion, of an order issued by the Respondent National Labor Relations Board against your Petitioner on September 4, 1959 and denying a cross-petition to review said order.

Opinions Below.

The Decision and Order of the Respondent Board in Case No. 21-CB-1199 of that agency's docket [R. 8-14]* and the accompanying Trial Examiner's Intermediate Report and Recommended Order [R. 14-44]* are officially reported at 124 N. L. R. B. 842 (No. 105), and unofficially reported at 44 L. R. R. M. 1511 and C. C. H. Labor Law Reports (1959-60), Par. 56,643.

The Opinion containing the judgment of the United States Court of Appeals for the Ninth Circuit in Case No. 16,907 of its docket, which is not yet officially reported, is printed as Appendix B hereto, along with the resulting Decree Enforcing, as Modified, an Order of the National Labor Relations Board (Appendix C, *infra*). Said opinion is unofficially reported at 50 L. R. R. M. 2220 and 45 C. C. H. Labor Cases, Par. 17,624.

Jurisdiction.

Said opinion of the Court of Appeals was entered on May 10, 1962 and its decree in conformity therewith was entered on July 2, 1962. An order of the Court of Appeals was entered on June 1, 1962, staying the issuance of its mandate in this case pending the filing, consideration, and disposition by this Honorable Supreme Court of the within petition for a writ of certiorari, provided that the same is filed on or before August 1, 1962.

The jurisdiction of this Court to review the instant case is invoked under 28 U. S. C. §1254(1).

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*As provided by Rules 21(4) and 23(1)(i), nine copies of the record as printed for the use of the Court of Appeals, containing the Board's Decision and Trial Examiner's Intermediate Report are filed herewith.

Questions Presented.

1. Whether the last sentence of Section 10(b) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, prohibits the Respondent Board's admission and consideration of hearsay testimony regarding purported admissions by the Employer to the effect that he was discharging an employee because of Union pressure to support its findings in an unfair labor practice proceeding that a labor union violated Sections 8(b)(2) and 8(b)(1)(A) of said Act?

2. Whether, as a matter of law, it is prejudicial error amounting to denial of due process for the Respondent Board to rely upon incompetent hearsay testimony regarding purported admissions by the Employer to the effect that he was discharging an employee because of Union pressure in an unfair labor practice proceeding brought solely against a labor union for alleged violation of Sections 8(b)(2) and 8(b)(1)(A) of said Act, where no complaint was issued against such Employer for alleged violation of Section 8(a)(3)?

Statutory Provisions and Regulations Involved.

The relevant portions of the following statutory provisions and regulations involved in this case are printed verbatim as Appendix A, *infra*:

Sections 7, 8(a)(3), 8(b)(1)(A), 8(b)(2) and 10(b) of the National Labor Relations Act, as amended (61 Stat. 186, 65 Stat. 601, 72 Stat. 945, 29 U. S. C. §151, *et seq.*).

Section 7(c) of the Administrative Procedure Act (60 Stat. 237, as amended, 5 U. S. C. §1001, *et seq.*).

Section 102.39 of the Rules and Regulations and Section 101.10 of the Statements of Procedure, National Labor Relations Board, Series 2, (24 F. R. 9095).

Statement of the Case.

On May 17, 1960, the Respondent Board filed a petition for judicial enforcement of its order against Local 776, IATSE, your Petitioner herein, with the United States Court of Appeals for the Ninth Circuit [R. 209-210], which was followed by a cross-petition for judicial review of said order [R. 211-213], thereby invoking the statutory jurisdiction of the court below under Sections 10(e) and (f) of the National Labor Relations Act, as amended (29 U. S. C. §160, subds. (e) and (f)).

A. The Board Hearings.

On March 16-17, 1959, formal unfair labor practice hearings were held in this matter before the Respondent Board's Trial Examiner, David F. Doyle [R. 14; 45-191], to litigate the issues raised by the pleadings [R. 3-8] as to whether Local 776, IATSE (Film Editors), your Petitioner (hereinafter referred to as "Local 776" or "the Union"), violated Sections 8(b)(1)(A) and (2) of the Act by causing Cascade Pictures of California, Inc. (hereinafter referred to as "Cascade" or "the Employer"), to discharge its employee, Henry A. Carlson, the individual charging party, for lack of union membership.

The "relatively brief" verbal testimony offered by the Board's General Counsel in support of his complaint came from three witnesses [R. 18]:

(1) *Henry A. Carlson*, the charging party and alleged discriminatee [R. 47-83; *Cf.* Int. Rept. at R. 18-23];

(2) *Bernard Loftus,* his general supervisor [R. 102-133; *Cf.* Int. Rept. at R. 24-28];

(3) *Lester Selson,* his immediate supervisor [R. 83-101; *Cf.* Int. Rept. at R. 23-24].

On one basic and essential element of the General Counsel's case, his proof consisted of *hearsay testimony* admitted over objections by counsel for Local 776, concerning alleged conversations between *Carlson and Selson* [R. 52; 55-57; 58; 85] and between *Carlson and Loftus* [R. 53-55] which supposed conversations took place outside the presence of any Union officer, agent or representative.

So far as is material to the consideration of the questions presented by the instant petition for a writ of certiorari, the critical hearsay testimony offered by the General Counsel to support his contention that "Cascade pictures discharged Mr. Carlson because of [the] Union's request to so discharge him" [R. 47] consisted of the charging party's uncorroborated testimony received over objection, that in a telephone conversation* shortly before Carlson's discharge *"Mr. Loftus said he was very sorry, that he had the Union on his back, and he was forced to let me go by the end of the week."* [R. 54-55. For Loftus' denial that he made the statement and that there was any "union pressure or threat or anything of that sort," see R. 112-115]. Coupled with this critical hearsay testimony, the Trial Examiner also permitted Carlson and Selson both to testify over

*The Trial Examiner mistakenly found contrary to the record that Loftus "called Carlson to his office" for this conversation [R. 19-20], but the Board shrugged this off as a "minor inaccuracy." [R. 10, footnote 3.]

objection, in an almost classic example of hearsay twice-removed, that about ten minutes after the above-mentioned purported Carlson-Loftus telephone conversation, Carlson told Selson, his immediate supervisor, that he had been informed by Loftus that he was to be replaced because he was "not in good standing with the Local" [R. 55-56; 85; and 97-98].

In addition to several other concededly erroneous rulings as to admission of evidence at this formal hearing,** Trial Examiner Doyle not only overruled the objections by counsel for Local 776 to this critical hearsay testimony, subject to a later motion to strike, but after granting Local 776 permission to present such a motion to strike the challenged hearsay testimony in its post-hearing brief [R. 135-138], denied that motion in his Intermediate Report [R. 31-32].

B. The Intermediate Report.

On May 12, 1959, Trial Examiner Doyle issued his Intermediate Report [R. 14-144] which concluded that "the General Counsel has proven by a preponderance of the evidence that the Union caused the discharge of Carlson in violation of Section 8(b)(1)(A) and (2) of the Act as alleged in the complaint" [R. 38; see also Conclusions of Law Nos. 3-5, incl., at R. 40]. In reaching this conclusion, the Trial Examiner accepted all of Carlson's testimony, including the inadmissible

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**For example, the Board and the Court of Appeals found that the Trial Examiner probably erred in admitting Loftus' pre-hearing statement as substantive evidence, contrary to the rule in *N.L.R.B. v. Quest-Shon Mark Brassiere Co., Inc.*, 185 F. 2d 285 (2d Cir., 1950). [R. 9, footnote 2; Opinion, Appendix B, p. 14.] The Court of Appeals also found, contrary to the Board that the Trial Examiner's ruling admitting so-called "background evidence" was error.

hearsay; gave "limited" weight to Selson's testimony; and refused to credit much of Loftus' testimony [R. 33-34].

As observed by Circuit Judge Koelsch in the opinion of the court below (Appendix B, *infra*, p. 6), Trial Examiner Doyle "acknowledged in his Intermediate Report that there was no direct proof of [the Union's] complicity in the dismissal", but "was of the opinion that the record manifested an 'implicit' demand by [the Union] upon Cascade to discharge Carlson."

In his Intermediate Report finding Local 776 guilty of 8(b)(1)(A) and 8(b)(2) violations as charged by Carlson, the Trial Examiner thus relied in large part upon the following duly-challenged portions of "the record":

(1) Carlson's uncorroborated remote "background evidence", receipt of which the Court of Appeals found "was error" [R. 18-19, 31, and 35];

(2) The excerpt from Loftus' pre-hearing statement which the Court of Appeals and the Board both found "could not be used to establish the truth of the fact stated" [R. 26-28 and 32];

(3) Carlson's uncorroborated hearsay testimony that Loftus told him over the telephone that "he had the Union on his back" [R. 20, 31-32, and 34];

(4) The hearsay testimony of Carlson and Selson that the former had immediately reported his telephone conversation with Loftus to the latter [R. 20, 23, and 31-32].

In denying the motion of Local 776 to strike the hearsay testimony as to Carlson's alleged conversations with

Loftus and Selson "taking place outside the Union's presence and without the Union's knowledge", the Trial Examiner stated in his Intermediate Report [R. 31-32]:

> "One of the essential elements of this cause of action is that Carlson was discharged by the Company in violation of Section 8(a)(3) of the Act. The alleged hearsay is all direct evidence addressed to establishing that point. The violation of Section 8(a)(3) by the Company is basic, to the further allegation, so vigorously opposed by counsel, that the Union attempted to cause and caused this discharge. Of course, the Union is not, and cannot be held responsible for the conduct of the Com-Company's officers, if they acted independently of the Union. However, the evidence relating to the conduct of Company officers is competent, relevant and essential to the General Counsel's cause of action. This motion is denied."

C. The Board Panel's Decision.

A three-member panel of the Respondent Board consisting of former Chairman Leedom, former Member Jenkins, and Member Rodgers, issued its decision on September 4, 1959 [R. 8-14]. After reviewing the challenged evidentiary rulings of the Trial Examiner to which exceptions had been duly taken by Local 776, the Board panel found that "no prejudicial error was committed" by the Trial Examiner in making such rulings. [R. 9, footnote 2 and text thereto].

Specifically as to the exception to the Trial Examiner's failure to strike the inadmissible hearsay testi-

mony "relating to conversations between Carlson and two Company representatives, Loftus and Selson", the Board panel stated in footnote 2 of its decision:

> ". . . The testimony was admitted, and relied upon by the Trial Examiner, not as evidence of the [Union's] efforts to cause Carlson's discharge, but for the limited purpose of establishing the Company's motive and reason for discharging Carlson. For that purpose, the testimony was clearly competent and material . . ."

The Board panel accepted and adopted the Trial Examiner's ultimate findings, conclusions and recommendations, [R. 10] likewise relying upon the questioned hearsay testimony to find that Local 776 had violated Sections 8(b)(2) and 8(b)(1)(A) by causing Carlson's employer to discharge him for lack of union membership.

D. Decision of the Court Below.

In granting enforcement, as modified, of the Respondent Board's order against Local 776 and denying its cross-petition for review, the Court of Appeals upheld your Petitioner's attack on the form of the Board order as "excessive in scope", but rejected attacks by counsel for Local 776 on the validity of the Board order based upon the grounds of "insufficiency of the evidence to support the critical finding" and "error in the admission of evidence, prejudicial to the Union" (Appendix B, *infra*, pp. 6 and 15).

Circuit Judge Koelsch, on behalf of the Court below, expressly relies in his opinion on Carlson's testimony that "*Mr. Loftus said he was very sorry, that he had the Union on his back and he was forced to let me go by the end of the week*" as part of the evidence in the record supporting the Board's "factual conclusion" of an 8(b)(2) violation by Local 776 as being "neither unreasonable nor too tenuous to stand", noting that Webster's Dictionary defines the term "*on one's back*" as "assailing or weighing upon one". (Opinion, footnote 4 and text thereto; Appendix B, *infra*, p. 8.)

While conceding that this purported Loftus' statement was "*hearsay*" as to Local 776 similar to testimony disapproved by this same Ninth Circuit Court of Appeals in *N. L. R. B. v. Amalgamated Meat Cutters*, 202 F. 2d 671 (9th Cir., 1953), the opinion of Circuit Judge Koelsch expressly approves the Board's reliance herein upon this "Loftus . . . statement to Carlson assigning union pressure as the basis for this action . . . even though he named no particular union". The opinion treats this admitted "hearsay" as competent evidence that Carlson was dismissed by Cascade solely because of his non-union status in violation of Section 8(a)(3) of the Act, which supports the further 8(b)(2) finding against Local 776 (Appendix B, *infra*, pp. 8 and 10).

In specifically reviewing the rulings of the Trial Examiner and the Board regarding the admission over objections of Carlson's testimony and other similar hear-

say testimony given by the witness Selson as to this purported Loftus' statement, the Court of Appeals rejected your Petitioner's argument that "such alleged conversations might constitute 'direct evidence' in an 8(a)(3) proceeding against the Company, but constitute objectionable hearsay when introduced against the Union to prove the truth of the statements supposedly made by the employer in an 8(b)(2) case". In so doing, the opinion of Circuit Judge Koelsch declared—

> ". . . this argument overlooks the nature of the violation charged and the limited purpose for which the proof was admitted . . . the charge that the union caused the employer to discharge his employee is 'derivative' and thus required proof, if it was to be sustained, of the employer's unlawful discrimination against its employee, as well as proof that a particular labor organization caused the employer to so discriminate. (citing cases) In this proceeding the testimony was admitted by the trial examiner and considered by both him and the Board not to prove [the Union's] coercion of employer discrimination but solely to establish the fact that Cascade had engaged in conduct which would violate section 8(a)(3). So limited, the admission and consideration of the testimony was proper."

REASONS FOR GRANTING THE WRIT.

1. The Questions Presented Herein Are of Great Importance in the Administration of Sections 8(b)(2) and 10(b) of the Amended National Labor Relations Act.

With the passage of Title I of the Taft-Hartley Act in 1947 (61 Stat. 136), Congress not only amended the Wagner Act of 1935 (49 Stat. 454) to create a new "unfair labor practice" in Section 8(b)(2) forbidding a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee" for lack of union membership in violation of Section 8(a)(3). In 1947, Congress also amended the last sentence of Section 10(b) of the Act with respect to the "rules of evidence" applicable to "unfair labor practice" proceedings.

The instant decision of the Ninth Circuit Court of Appeals misconstrues Section 8(b)(2) as authorizing a "*derivative*" charge that a labor union caused an employer to discriminatorily discharge his employee and on this mistaken basis expressly holds, without regard to the evidentiary requirements of Section 10(b) as amended, that hearsay evidence as to employer admissions are competent "to establish the fact that [the employer] had engaged in conduct which would violate section 8(a)(3)" in an 8(b)(2) proceeding solely against a labor union.

Under "the more liberal original wording of Section 10(b) of the National Labor Relations Act" (see *N. L. R. B. v. Imparato Stevedoring Corp.*, 250 F. 2d 297 (3rd Cir., 1957), footnote 4 and text thereto)—

> "In any such [unfair labor practice] proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling." (49 Stat. 454.)

In 1946, Congress adopted Section 7(c) of the Administrative Procedure Act (60 Stat. 241, 5 U. S. C. §1006(c)) applicable to "unfair labor practice" proceedings, providing that "Any oral or documentary evidence may be received . . ." but expressly declaring that "no sanction shall be imposed or . . . order issued except . . ." as supported by and in accordance with the reliable, probative and substantial evidence".

In 1947, as disclosed by the legislative history of the Taft-Hartley Act (Conference Report No. 510, 80th Cong., 1st Sess., p. 56, 2 Leg. Hist., LMRA 560, quoted by the opinion of Circuit Judge Allen in *Pittsburgh Steamship Co. v. N. L. R. B.*, 180 F. 2d 731 (6th Cir., 1950), aff'd 340 U. S. 498), Congress adopted provisions amending the above-quoted portion of Section 10(b) of the Wagner Act to "insure the Board's receiving only legal evidence" and imposing "a duty" upon the Courts of Appeal to "see that the Board observes the provisions" of the amended last sentence of Section 10(b) which now specifically states that—

> "Any such [unfair labor practice] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure . . ."

As Senator Taft pointed out at the time, the Senate accepted the House bill's language containing this amendment as a "preventative measure" requiring the Board and its trial examiners "generally to follow the rules of evidence prevailing in the courts" rather than "accepting literally anything into the record" and reverting to earlier "widespread abuses of its latitude in

admitting evidence in . . . Board proceedings". (2 Leg. Hist., LMRA 1542 and 1625). Thus, Congress recognized that this and other such statutory requirements would *"in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine—whether the requirements have been met"*; also, that "If the Board is required, so far as practicable, to act only on legal evidence, the substituting, for example, of assumed 'expertness' for evidence will no longer be possible." (Conference Report No. 510, 80th Cong., 1st Sess., pp. 53 and 56; 2 Leg. Hist., LMRA, pp. 557 and 560).

In its decision authorizing the Respondent Board to revert in 8(b)(2) cases against labor unions under the Taft-Hartley Act to its "earlier habit" prevailing in 8(3) cases against employers under the Wagner Act which Senator Taft called "indefensible" (2 Leg. Hist., LMRA 1625), *i.e.*, the "irresponsible admission and weighing of hearsay" (House Report No. 1902, 76th Cong., 3rd Sess., p. 76; see *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474), the Ninth Circuit Court of Appeals in this instant case has raised important questions of Federal law. Contrary to the Sixth Circuit, the Ninth Circuit now apparently refuses to recognize that ". . . the rules concerning evidence have been expressly changed by both the Taft-Hartley Act and the Administrative Procedure Act" and that the "new and emphatic" rules laid down by Section 7(c) of the Administrative Procedure Act taken together with

the amendments made by Section 10(b) of the Taft-Hartley Act "were designed to eliminate the wholesale use of hearsay" which is "wholly incompetent testimony" (such as "hearsay testimony" that an employee was discharged for a reason related to his union status) as "the basis of important findings" by the National Labor Relations Board (*Pittsburgh Steamship Co. v. N. L. R. B., supra*).

The instant decision of the Ninth Circuit Court of Appeals thus involves "an important phase of the administration of the National Labor Relations Act" and questions of public importance concerning the validity of the Board's order which goes far beyond the "fair assessment of a record on the issue of unsubstantiality" and warrants granting certiorari herein (*N. L. R. B. v. Pittsburgh S.S. Co.*, 340 U. S. 498, 499, 502; *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, 149; *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 134).

As the last-cited case correctly states (312 U. S. at p. 155, emphasis added), ". . . it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies *in the absence of a statutory requirement* that such rules are to be observed", but the instant case raises the important question as to whether or not the changes made in the last sentence of Section 10(b) of the Act constitute a meaningful statutory requirement of this sort.

As Professor Forkosch wrote in his *Treatise on Administrative Law* (Bobbs-Merrill Company (1956), pp. 350-351):

> "The legalistic jury-trial rules of evidence, in the absence of a statutory requirement do not apply in administrative proceedings . . . but . . . a statutory requirement may be present. For example, what do provisions such as those found in the original 1935 and later 1947 amendments to [Section 10(b) of] the Wagner Act mean . . . Superficially this change in language should presage a much stricter agency policy concerning admission of evidence at least for this Board, but apparently this has not occurred."

"The Board's regulations do no more than repeat the statutory language." (*N. L. R. B. v. Imparato Stevedoring Corp., supra,* footnote 3; see Section 102.39 of the Board's Rules and Regulations and Section 101.10(a) of the Board's Statements of Procedure, 29 F. R. 9095, reproduced in Appendix A, *infra,* at pp. 3-4). The Ninth Circuit Court's opinion in this case does not cite or discuss the statutory language nor the Board's regulations. Only an authoritative opinion of his Honorable Supreme Court can settle these important questions regarding the rules of evidence applicable to "unfair labor practice proceedings" under Section 10(b) of the Act.

2. The Ninth Circuit Court of Appeals Has Misconstrued and Misapplied the Opinions of This Supreme Court in the Radio Officers and Consolidated Edison Cases.

In the opinion of the court below, Circuit Judge Koelsch cites the opinion of this Supreme Court in *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, at p. 53 and cases in accord therewith (*i.e.*, the Ninth Circuit's opinion in *N. L. R. B. v. International Longshoremen's & Warehousemen's Union*, 210 F. 2d 581 (9th Cir., 1954), and *N. L. R. B. v. Local 57, etc.*, 201 F. 2d 771 (1st Cir., 1953)) for the proposition that proof of unlawful discrimination against an employee in violation of Section 8(a)(3) is required to support an 8(b)(2) finding against the particular labor union charged with causing an employer to so discriminate, even where the employer is not or cannot be included as a party to the Board proceedings.

To be sure the *Radio Officers'* case stated that the National Labor Relations Board could proceed against the union alone under Section 8(b)(2) which "requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate §8(2)(3)." However, nothing in that decision by this Supreme Court warrants its construction or application so as to hold that required proof of the employer's commission of an unfair labor practice in an 8(b)(2) proceeding may include hearsay testimony of employer admissions which are not binding against the union which is the sole party respondent before the Board.

The opinion of the Ninth Circuit Court of Appeals herein cites and quotes in footnote 3 from the opinion of this Supreme Court in *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, stating that there—

> ". . . the Supreme Court defined the term 'Substantial evidence' as '. . . . more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'."

For some inexplicable reason the Ninth Circuit's opinion totally disregards those aspects of the 1938 *Consolidated Edison* decision touching directly upon the validity of an objection that "the Board received 'remote hearsay' and 'mere rumor' . . ." in the light of the 1935 Wagner Act version of Section 10(b) which then provided that court rules of evidence "shall not be controlling" (305 U. S. at pp. 229-230).

In the just-cited portion of its opinion in *Consolidated Edison* this Supreme Court specifically interpreted the last sentence of Section 10(b) of the National Labor Relations Act as it read in 1938 in the following oft-quoted language:

> "The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order (citing such cases as *Interstate Commerce Commission v. Baird*, 194 U. S. 25; *Interstate Commerce Comm. v. Louisville & N. R. Co.*, 227 U. S. 88; and *United States v. Abilene & S. R. Co.*, 265 U. S. 274). But this

> assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

This Supreme Court disapproval of reliance upon "mere uncorroborated hearsay or rumor" in the *Consolidated Edison* case was quoted by Congressman Walter during the legislative debates preceding the adoption in Section 7(c) of the Administrative Procedure Act of the requirement that agency orders be "supported by and in accordance with" evidence which was not only "substantial" but also "reliable" and "probative." (92 Cong. Rec. 5653.) Under this 1946 Act it was thus intended that "The standards and principles of probity and reliability of evidence must be the same as those prevailing in courts of law or equity in non-administrative cases . . . ." (Senate Report No. 248, 79th Cong., 2nd Sess., p. 208.)

Congress was also aware when it adopted the Taft-Hartley Act in 1947 that, although *Consolidated Edison* declared that Board findings could not be based upon hearsay alone or upon hearsay corroborated by a mere scintilla, under the last sentence of Section 10(b) of the Wagner Act as construed in that case by this Supreme Court, and by Courts of Appeal like the Ninth Circuit in *N. L. R. B. v. American Potash and Chemical Corp.*, 98 F. 2d 488 (9th Cir., 1938), the fact that "some of the evidence was hearsay" was "no basis

for objection to the finding." Accordingly, in Section 10(b) of Title I of the Taft-Hartley Act, "Congress eliminated that language and substituted a provision that hearings 'shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States'." (*Pittsburgh Steamship Co. v. N. L. R. B., supra,* 180 F. 2d 731, aff'd, 340 U. S. 498.) By so doing, as Senator Morse pointed out during the Taft-Hartley Act debates (2 Leg. Hist., L. M. R. A. 1560), the 1947 legislation ". . . singles out the Board, among the agencies, for special treatment as to . . . the rules of evidence . . . contrary to . . . the statutes and rules of other agencies, like the Federal Trade Commission, and including the present [1935] National Labor Relations Act."

The instant decision by the Ninth Circuit Court of Appeals erroneously disregards the declaration of this Supreme Court in the *Consolidated Edison* case, *supra,* 305 U. S. at p. 229, that it was only the particular language of the last sentence of Section 10(b) of the 1935 statute—which Congress eliminated and replaced with a contrary rule in 1947—that previously freed the National Labor Relations Board from the compulsion of the rules of evidence applicable to judicial proceedings and formerly insulated Labor Board administrative orders from being invalidated because of reliance upon incompetent and judicially inadmissible hearsay.

3. The Important Questions Presented Herein Should Be Settled by This Supreme Court so as to Resolve the Existing Conflict of Decisions or Authorities.

It is well-settled in the Ninth Circuit, as in other Circuits, that ". . . apart from this provision of §10(b), in proceedings conforming to the requirements of the Administrative Procedure Act, agency findings cannot be based upon hearsay alone."

N. L. R. B. v. Amalgamated Meat Cutters, 202 F. 2d 671 (9th Cir., 1953), citing *Willapoint Oysters v. Ewing*, 174 F. 2d 675, 691 (9th Cir., 1949);

Del E. Webb Construction Co. v. N. L. R. B., 196 F. 2d 841, 846 (9th Cir., 1952);

Morrison-Knudsen Co. v. N. L. R. B., 276 F. 2d 63 (9th Cir., 1960).

Thus, Circuit Judge Koelsch, in the opinion for Circuit Judge Barnes, District Judge Yankwich and himself in the instant case, conceded that the above-cited *Amalgamated Meat Cutters* case would dictate a denial of the Respondent Board's petition for enforcement of its order if the record revealed no more than the testimony regarding the Loftus' statement to Carlson assigning union pressure as the basis for his discharge which was "hearsay as to [Local 776]."

The instant decision conflicts at least in principle with the *Amalgamated Meat Cutters* decision by Circuit Judges Pope, Healy and Orr of the Ninth Circuit and the Seventh Circuit's decision cited therein (*Superior Engraving Company v. N. L. R. B.*, 183 F. 2d 783, (7th Cir. 1950), reh. den., cert. den., 340 U. S. 930).

In *Amalgamated Meat Cutters*, the opinion by Circuit Judge Pope declared that, when Section 10(b) is taken into consideration, "hearsay evidence must be excluded from consideration by the Board and by us."

While *Superior Engraving* upheld the exclusion of inadmissible hearsay testimony by the Board's trial examiner in the case, it did so on the basis that Section 10(b) does ". . . require the Board to conduct its proceedings in accordance with the rules of evidence applicable in the district courts" and that obviously if the Board acted in disregard of the statutory directions in regard to the evidence upon which its findings must be based "an enforcement court would set aside its orders as arbitrary." On rehearing in *Superior Engraving*, the Seventh Circuit noted that Section 10(b) only required the Board to conduct unfair labor practice proceedings under court rules of evidence "so far as practicable" but observed that "The rule excluding hearsay is a basic rather than a technical rule."

The instant decision also conflicts at least in principle with the Ninth Circuit decision in *N. L. R. B. v. Haddock-Engineers, Ltd.*, 215 F. 2d 734 (9th Cir., 1954), which, on the authority of *Consolidated Edison v. N. L. R. B., supra*, 305 U. S. 197, 229-230; *N. L. R. B. v. Bell Oil & Gas Co.*, 98 F. 2d 406, reh. den. 98 F. 2d 870 (5th Cir., 1938); and *Pittsburgh Steamship Co. v. N. L. R. B., supra*, 180 F. 2d 731, 733 (6th Cir., 1950), held that hearsay as to an admission by a Company official does not constitute competent evidence supporting a Board order against a labor organization since "the Company is not the agent of the Union with power to make admissions for the Union."

The *Bell Oil & Gas Company* case was decided by the Fifth Circuit under the old Wagner Act Section 10(b). It held that there was nothing in the 1935 statute to indicate that an enforcement court should consider "incompetent evidence" merely because "Congress intended for the administrative and quasi-judicial proceedings before the Board to be free, within constitutional limitations, from the ordinary rules of evidence." On rehearing in that case, the Fifth Circuit recognized that under the old Section 10(b) of the 1935 Act "it is not error for the Board to hear incompetent evidence" but this "does not mean that a finding of fact may rest solely upon such evidence." Sixteen years later, in *N. L. R. B. v. Local Union 418*, 212 F. 2d 846 (C. A. 5th, 1954), this same Circuit Court, without citing the new Section 10(b) of the 1947 Act or even indirectly noting the change in the statutory language of the last sentence of that section, flatly stated that "Exact rules of evidence applied in court trials do not have to be followed in hearings before a trial examiner and it is sufficient if, from the whole case, there is substantial proof of the charges made in a proceeding of this kind."

The instant decision also conflicts in principle with the Ninth Circuit's decision in *N. L. R. B. v. Thomas Rigging Co.*, 211 F. 2d 154 (9th Cir., 1954), which refused enforcement of an 8(b)(2) order against a labor union and its business agent where the Board relied upon hearsay statements by a Company foreman to each of the alleged discriminatees that "he could not obtain employment unless he received clearance from the [Union] since such statements were "in no way binding" upon the labor union or its agent.

At least two other Circuit Courts of Appeal have been confronted with this important question as to administrative utilization of hearsay evidence in making National Labor Relations Board findings.

In *N. L. R. B. v. Carpet Layers Union, Local 419*, 213 F. 2d 49 (10th Cir., 1954), an alleged discriminatee was permitted to testify before the Labor Board that his general supervisor made statements to him that he knew his immediate supervisor received a call from a union agent requesting to take him off the job. The Board's 8(b)(2) order against the union was "challenged on the . . . ground that prejudicial error was committed by the trial examiner in admitting and considering secondary hearsay." Since, unlike the instant case, no reference was made to the hearsay testimony in the findings made by the trial examiner and later adopted by the Board and there was nothing in the record indicating that the hearsay was taken into consideration in making such findings, the Tenth Circuit found it "unnecessary" to explore the questions raised by this petition for certiorari to the Ninth Circuit herein.

The only Court of Appeals which has specifically alluded to the 1947 legislative change in the last sentence of Section 10(b) to hold that the "mere receipt of hearsay evidence . . . is not enough to require reversal" of a Board "unfair labor practice" order is the Third Circuit in *N. L. R. B. v. Imparato Stevedoring Corp., supra*, 250 F. 2d 297 (3rd Cir., 1957). There Circuit Judge McLaughlin cites this Supreme Court's *Consolidated Edison* decision under the original wording of Section 10(b) of the 1935 Wagner Act and the Ninth Circuit's *Willapoint Oysters* decision under Section

7(c) of the Administrative Procedure Act standing by itself in an effort to create a distinction between "uncorroborated hearsay" and "probative hearsay which is corroborated" in "the treatment of hearsay evidence" under Section 10(b) of Title I of the 1947 Taft-Hartley Act.

It is submitted that certiorari should be granted in the instant case "to resolve the conflict, the matter being of importance in the administration of the . . . Act." (*New York v. Saper*, 336 U. S. 328, 329.)

4. The Instant Court of Appeals' Decision Has so Far Sanctioned the Labor Board's Departure From the Basic Rules of Evidence as to Call for an Exercise of This Supreme Court's Power of Supervision.

Even in the case of administrative agencies which, unlike the National Labor Relations Board under the amended Section 10(b), are not bound by the rules of evidence applicable to judicial proceedings, "the more liberal the practice in admitting testimony, the more imperative to preserve the essential rules of evidence by which rights are asserted or defended."

Interstate Commerce Comm. v. Louisville & N.R. Co., 227 U. S. 88, 93;

Bridges v. Wixon, 326 U. S. 135, 154.

An administrative order must be held void which rests upon evidence which is improperly received and considered if this is "essential to the preservation of the substantial rights of the parties" and the "matter improperly treated as evidence may have been an important factor in the conclusions reached." (*United States v. Abilene and S. R. Co.*, 265 U. S. 274, 288).

Where "evidence was improperly received and where but for that evidence it is speculative whether the requisite finding would have been made" so that there has been a sanction imposed "without a fair hearing", the courts are under a duty to correct such arbitrary procedures (*Bridges v. Wixon, supra,* 326 U. S. at p. 156). Rules against admission of hearsay "are designed as safeguards against essentially unfair procedures" and "one is legally entitled to insist upon the observance of rules promulgated pursuant to law". (*Ibid.,* p. 152). "The deep-rooted policy of the law towards hearsay evidence cautions against such a loose reading of these fundamental procedural safeguards." (*Ibid.,* p. 152, footnote 6).

In the instant case the Court of Appeals has sanctioned the Respondent Board's reliance upon hearsay testimony of the charging individual as to purported statements by the employer as to the reason for his discharge to support a critical finding upon an essential element of the case against the labor union charged with a violation of Section 8(b)(2) and derivatively Section 8(b)(1)(A) of the Act. If this decision is permitted to stand, it will remain as judicial precedent which will subject every labor organization in the United States subject to the National Labor Relations Act as amended to 8(b)(2) proceedings before the Respondent Board in which such hearsay testimony as to employer statements can be used in evidence against it. Every discharged employee who is unsympathetic to the union and every employer who is unfriendly to the union will be a potential source of such hearsay testimony. The Trial Examiner, the Board, and the Court of Appeals in this case all relied upon Carlson's testimony

that Loftus told him he was being discharged because he *"had the Union on his back"*. Such a procedure is so manifestly unfair and contrary to the basic rules of evidence that this Supreme Court should exercise its power of supervision over such administrative and judicial proceedings to correct this obvious prejudicial error amounting to a denial of due process of law.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT W. GILBERT,
LOUIS A. NISSEN,
WILLIAM B. IRVIN,
By ROBERT W. GILBERT,
Counsel for Petitioner.